In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-755

JACK W. TRIPP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Western District of Washington, petitioner was convicted of having possessed property stolen from the United States mails, in violation of 18 U.S.C. 1708. He was sentenced to four years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. A).

The facts are not in dispute. The Federal Reserve Bank in Seattle, Washington, sent $80,000 in new ten-dollar bills by registered mail to a bank in Fairbanks, Alaska. The currency was stolen from the

BLURRED COPY

custody of a Fairbanks post office. Six months later a freight employee of Alaska Airlines checking a shipment suspected that a package had been damaged and heard broken glass inside it. An airline agent opened the package to ascertain the damage. The parcel contained a framed lithograph, the glass on which had shattered. He found that protruding from the back of the frame were a number of ten dollar bills. The package was dismantled and taken to the office of the airline's freight supervisor, Val Westphalen, who knew that the consignor of the package, petitioner, was a former postmaster at the post office where the theft had occurred; he also knew that the consignee was a former postal inspector (Pet. App. A-2). Westphalen then telephoned the FBI and postal officials (Tr. 88-90).[1] Merlin DeVere, the postal inspector, who had been investigating the robbery, recalled that Westphalen said " 'We have a hot potato' " (Tr. 104). Westphalen asked the inspector and his associate to come to his office immediately, because the consignee had been notified of the arrival of the parcel and might appear at any time to claim it (Tr. 90-91). When the inspectors reached the air freight office, the money was spread out on top of the package (Tr. 104). Westphalen testified that "we didn't want that large amount of money around the office" and that he had told the inspectors they could take custody of the parcel by signing the delivery receipt. He then delivered the

---

[1] "Tr." refers to the trial transcript. "Memo." refers to the Memorandum in support of Defendant's Motion to Suppress. We are lodging a copy of each with the Clerk of this Court.

package and its contents to Inspector DeVere (Tr. 93). The postal inspectors had no warrant.

Petitioner's sole contention is that, by accepting the package from Westphalen without first having obtained a search warrant, the postal inspectors conducted an illegal search and seizure. (In the district court, petitioner recognized that the government did not participate in a search, claiming only that the acquisition was an unlawful seizure (Memo., pp. 2, 6).) Since the undisputed trial testimony showed that the package had been completely opened and that its contents were within plain view at the time the postal inspectors arrived, petitioner has no grounds for challenging the constitutionality of the "search" by employees of the freight carrier. Since the money was stolen, there is little basis for recognizing his standing to contest the lawfulness of the postal inspectors' "seizure" of the money discovered by the airline employees.

In any event, acceptance of the package by the federal officers in the absence of a warrant did not constitute an illegal seizure. Where a private person, lawfully or unlawfully, makes a search and voluntarily turns over the results to government officials, the evidence so obtained is not rendered inadmissible by the exclusionary rule of the Fourth Amendment, which was designed to protect against unlawful governmental action. *Burdeau* v. *McDowell,* 256 U.S. 465. See also *Coolidge* v. *New Hampshire,* 403 U.S. 443, 487.

Even if the government's acquisition is deemed a "seizure" within the Fourth Amendment, it was justified. Although the agents' discovery of the money was

not a "plain-view" seizure in the classic sense discussed in *Coolidge* v. *New Hampshire, supra,* since it was not "inadvertent," the seizure without a warrant was clearly justified by the exigent circumstances that were present. Westphalen had communicated to Inspector DeVere his concern that the consignee might claim the package at any time and that the situation was therefore urgent. In such circumstances, the inspectors acted reasonably in surmising that there was insufficient time to obtain a warrant. See *Parish* v. *Peyton,* 408 F. 2d 60 (C.A. 4), certiorari denied, 395 U.S. 984; *United States* v. *Thomas,* 319 F. 2d 486, 488 (C.A. 6).

Contrary to petitioner's contention, there is no conflict between the position taken by the court of appeals in this case and decisions of the Fifth and Sixth Circuits. Both *United States* v. *Resnick,* 455 F. 2d 1127 (C.A. 5), and *Cash* v. *Williams,* 455 F. 2d 1227 (C.A. 6), involved searches in which government authorities actually participated. Furthermore, in neither case was there any danger that delay would result in the loss of the evidence. On facts similar to those presented here, these circuits have refused to suppress the evidence obtained. *United States* v. *Hodges,* 448 F. 2d 1309 (C.A. 6); *United States* v. *Winbush,* 428 F. 2d 357 (C.A. 6), certiorari denied, 400 U.S. 918; *Barnes* v. *United States,* 373 F.2d 517 (C.A. 5). The Eighth Circuit is also in accord with this position. *Kaufman* v. *United States,* 453 F. 2d 798 (C.A. 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

☆ U.S. Government Printing Office: 1973—492-117/408